Supreme Court, U.S.
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No.

IN THE

SUPREME COURT OF THE UNITED STATES

Ronald L. Porter

v.

Gordon E. England,
Secretary of the Departent of the Navy

On Petition For Writ Of Certorari To
The United States Court Of Appeals For The Ninth Circuit

PETTION FOR WRIT OF CERTIORARI

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61 pp

Mr. Porter's was permanently deprived of his property (competitive federal job); without due process and the equal protection available to other employee's; denied the opportunity to challenge the U.S. Navy's compliance with laws, regulations and rules; and denied the opportunity to challenge the constitutionality of the laws rules and regulations directly related to injuries he suffered.

The U.S. Navy is being granted the authority to be the sole judge of its own actions, which includes the application and interpretation of federal laws, regulations and rules, constitutional questions and constitutional challenges. Authorities granted under the U.S. Constitution to be the sole authority of the Judicial Branch.

Questions for Review

Questions being presented to the U.S. Supreme Court are asking the court to uphold the United States Constitution and its Amendments. They include, but not limited to the Separation of Powers Doctrine, Due Process, Equal Protection and Right of Redress.

1. Was Mr. Porter's job, as competitive appointment federal employee property?

2. Was Mr. Porter's constitutional right to due process under the 5th Amendment to the U.S. Constitution violated when he was permanently deprived of his property without due process?

3. Was it a violation of the U.S. Constitution to deny Mr. Porter the Equal Protection available to other competitive government employees, including employees at the same agency effected by the same Reduction in Force action?

4. Is it a violation of separation of powers doctrine for the court to grant an Executive Branch agency the authority to be the sole Judge of its actions and denying employees access to Judicial Branch oversight? Actions including the interpretation

and application of federal laws, regulations and rules, and Constitutional questions and Constitutional challenges.

5. Is it a violation of separation of powers doctrine for the Legislative Branch to grant the Executive Branch the judicial authority given solely to the Judicial Branch in the U.S. Constitution Article III, Section 2?

6. Is it a violation of the U.S. Constitution to create two classes of citizens with regard to how their constitutional rights protected, federal verses other government employees ?

7. Is it Constitutional to deny Mr. Porter equitable relief under common law against an arbitrary and capricious action of the government?

8. Did the U.S. Navy and the U.S. Office Of Personnel Management meet the statutory requirements to conduct the Personnel Demonstration Project under P.L. 95-454?

9. Did the U.S. Office of Personnel Management and/or the Navy have the authority under the Civil Service Reform Act to deprive Mr. Porter of due process rights?

10. Is there any evidence that the Congress intended to allow Personnel Demonstration Projects to deprive government employees of their constitutional rights?

11. Is P.L. 103-337, unconstitutionally vague when applied with P.L. 95-454, Chapter 47? A statute that was intended and solely designed to be used for temporary and experimental projects only.

12. Did Congress change the intent found by the U.S. Supreme Court in United States v. Fausto, 484 U.S. 439, (1988), concerning the exclusive nature of the Civil Service Reform Act when it wrote P.L. 101-12 in 1989? It stated, "nothing in this chapter or chapter 23 shall be construed to limit any right or remedy available under a provision of statute which is outside of both this chapter and chapter 23."

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BASIS FOR JURISDICTION

9th Circuit Court of Appeals Denial of Mr. Porter's Request for Rehearing/en banc, filed Sep. 30, 2002.
(Appendix A 1)

9th Circuit Court of Appeals Decision on Mr. Porter's Appeal, Submitted May 13, 2002, Filed May 28, 2002,.
(Appendix B 1-2)

United States District Court for The Eastern District of California's, Order Denying Plaintiff's Motion for Reconsideration, filed Feb. 14, 2001.
(Appendix C 1-4)

United States District Court for The Eastern District of California's Order Granting Defendant's Motion to Dismiss for Lack of Subject Matter Jurisdiction, filed Nov. 16, 2000.
(Appendix D 1-7)

Summary

Mr. Porter was not an at will employee, but a competitive service federal employee, with a liberty and property interest in keeping his government job. A classification specifically intended by congress to have job protections in the Civil Service Reform Act (CSRA), P.L. 95-454. On November 19, 1999, Mr. Porter lost his job through a Reduction In Force (RIF) action. A RIF action that was not conducted or controlled under normal statutes and regulations governing such actions, but rather under the rules of a Personnel Demonstration Project (Demo Project) also authorized by the CSRA. The Project had received wavers to specific statutes and regulations denying Mr. Porter any avenue, with which to receive Due Process and Equal Protections for RIF actions, see (Appendix H & I). A protection received and enjoyed by other agency employees who's jobs were effected by the same RIF action, but who's jobs were not covered by the Demo Project.

There is no indication in the CSRA, that congress intended or granted the authority for Demo Projects to be deny employees specific job protections or due process. In fact they intended employees to maintain all of their remedies, protections and merit system principles under such projects, PL 95-454, Chapter 47, Sec. 4703, (c), (5), (Appendix K).

Mr. Porter's action is distinguished from any other actions previously addressed by the courts, because he was harmed under the rules of a DEMO Project, waving protections in the CSRA. Protections which denied Mr. Porter the normal due process and equal protection he would have received through the Merit System Protection Board (MSPB), had the RIF been conducted without the wavers to statutes and regulations received to conduct the Demo Project.

The MSPB ruled in 75 M.S.R.P. 1, that it had no jurisdiction over the RIF actions conducted under this Demo Project in 1996, because of the wavers received to conduct the Demo Project. Without the availability of an appeal to the MSPB, Mr. Porter had no avenue with which to receive his right to Due Process or equal protection, under the Demo Project except through the courts. Mr. Porter did exhaust the only review process available to him under the Demo Project,

before filling his action in U.S. District Court. A process which did not meet even the most conservative standards of due process, with the decisions on his review being made by two Navy employees who had a stake in the outcome.

Considering the experimental nature and purpose of the Demo Project, and the congressional intent that employee's not be deprived of their protections under such projects it should have be assumed by the lower courts that Mr. Porter would receive his due process protections through the courts under general jurisdiction (28 U.S. C. §1331, 28 U.S. C. §1357, 28 U.S.C. §1366 & 42 U.S.C. 1983) and the Administrative Procedures Act (5 U.S.C. §702, §703, §704 & §706) as part of the experiment. Any other conclusion violates Mr. Porter's constitutional right to due process under the 5th Amendment of the U.S. Constitution and the equal protection received by other government employees not under such projects.

Mr. Porter's action raised constitutional questions and challenges directly related to the Demo Project. He also asserted that there were statues, regulations and rules that were not complied with for the approval and subsequent operation of the DEMO Project, including rules related to the RIF action under which he suffered the harm. He asserted that the Demo Project did not meet the statutory requirements to be initially approved, that it did not follow the approved rules when it conducted the RIF action, that the approved rules violated the U.S. Constitution, his right to due process, equal protection and separation of powers, by granting the agency sole judicial authority to make those determinations, with no judicial oversight. Thereby granting agency authority to be the sole judge its own actions. He also challenged the constitutionality of P.L. 103-337, (Appendix E), under the Vagueness Doctrine, because it failed to define what a permanent, temporary, experimental personnel demonstration project was, or if such a project was still granted the temporary wavers to statutes and regulations.

Congresses' sole intent and design when it authorized government agencies to conduct Personnel Demonstration Projects under the CSRA, was to provide a platform under which temporary and limited personnel management experiments, with specific cut off dates could be conducted to

determine the value of those new ideas and procedures if implemented throughout the federal government, not create separate personnel systems.

The decision of the lower courts in this action grants the sole authority over constitutional questions, adherence to federal statues, regulations and rules to two Navy employees, who have a vested interest in the outcome of their decisions.

It leaves Mr. Porter with no viable avenue of redress or a possibility of a remedy against a government action, one which denied him his property and violated his constitutional right to due process. I also leaves no avenue available for employees or citizens to ensure that the Navy complies with laws regulations and rules, because without an avenue of redress to the courts, the statutes, regulations and rules have no value.

Justification for Writ of Certiorari

There is a conflict between the U.S. Court's of appeals as to the coverage of the CSRA and whither or not it precludes jurisdiction in the federal courts regarding employee actions. There are dozens of cases addressing this issue in one form or another among the federal circuits, many conflicting opinions. The following cases are being submitted to the court as examples of the conflict, for two reasons; (1) they are both fairly recent cases heard two different circuits and ; (2) both case address the conflict between the circuits. In Miller v. U.S. Dept. of Agr. Farm Services Agency, 143 F.3d 1413, 11th Cir. (Ala.), (1998), (Appendix O), the court found jurisdiction under the APA and in Tiltti v. Weise, 155 F.3d 596, 2 nd (N.Y.),(1998), (Appendex P), where the court found serious questions about its jurisdiction because of the CSRA, but did not make a decision on the issue.

The court needs to address this Conflict between the U.S. Courts of Appeals regarding the courts jurisdiction under Administrative Procedures Act, general jurisdiction and constitutional questions as being precluded from the courts jurisdiction because of the CSRA. There are several reasons this issue should be addressed by the courts; (1) congress appears to have changed their intent to preclude judicial review of prohibited personnel actions in P.L. 101-12; there continuing array of cases being brought before the courts

because of the lack of clarity on the issue; (3) the question of citizens constitutional rights being voided by an act of congress; (4) the question concerning the Judicial Branch's power, authority and responsibility over the constitution and federal statutes, and; (5) if a citizen is left without access to all three branches of their government, as in this case. the Judicial Branch, how can they protect themselves and their government against arbitrary and capricious actions taken by government agencies of the Executive Branch, if their is no oversight by the Judicial Branch regarding compliance with federal statutes, regulations and rules. Without independent oversight by the Judicial Branch as intended by our forefathers, the federal statutes, regulations and rules have no value.

The following are excerpts from federal cases that are relevant to the issues of the appeal.

Tiltti v. Weise, 155 F.3d 596, C.A.2 (N.Y.),(1998)

> "The circuits are divided on whether the Reform Act precludes district court direct review of challenges by federal employees to personnel actions that allegedly violated their constitutional rights. A majority of the circuits that have considered the question have held that the district courts do not have such jurisdiction. See Stephens v. Department of Health and Human Servs., 901 F.2d 1571, 1576 (11th Cir.), cert. denied, 498 U.S. 998, 111 S.Ct. 555, 112 L.Ed.2d 562 (1990); Saul v. United States, 928 F.2d 829, 835-40 (9th Cir.1991); Lombardi v. Small Business Admin., 889 F.2d 959, 961-62 (10th Cir.1989); Pinar v. Dole, 747 F.2d 899, 910-12 (4th Cir.1984), cert. denied, 471 U.S. 1016, 105 S.Ct. 2019, 85 L.Ed.2d 301 (1985). Contra: see Mitchum v. Hurt, 73 F.3d 30, 35 (3d Cir.1995); Spagnola v. Mathis, 859 F.2d 223, 229-30 (D.C.Cir.1988) (en banc) (per curiam) (holding that Bivens remedy was precluded by the Reform Act but noting that "time and again this court has affirmed the right of civil servants to seek equitable relief against their supervisors, and the agency itself, in vindication of their constitutional rights")."

Helsabeck v. U.S., 821 F.Supp. 404,E.D.N.C., May 14, (1993).

"The court cannot conclude that excluding NAFI employees from the CSRA bars all judicial review for those employees; it simply puts them outside the umbrella of CSRA protections. The Fausto decision does not change this result, because the plaintiff in that case was an "employee" under the CSRA, but was specifically excluded from the judicial review provisions of the Act. The Supreme Court held that the purpose of the CSRA was to provide "an integrated scheme of administrative and judicial review, designed to balance the legitimate interests of various categories of federal employees with the needs of sound and efficient administration," Fausto, 484 U.S. at 445, 108 S.Ct. at 672, and that therefore its provisions provide the only relief for those

covered by the Act. Because NAFI employees are excluded from the coverage of the Act, however, other remedies for wrongful termination can be available to them under the APA. See e.g. Sheehan v. Army and Air Force Exchange Service, 619 F.2d 1132 (5th Cir.1980) (holding, inter alia that a NAFI employee could bring an action for nonmonetary relief under 5 U.S.C. § 701 and 28 U.S.C. § 1331), rev'd on other grounds 456 U.S. 728, 102 S.Ct. 2118, 72 L.Ed.2d 520 (1982), on remand 686 F.2d 262 (1982)."

OCONUS DOD Employee Rotation Action Group v. Cohen, 144 F.Supp.2d 1, D.D.C., (2000).

"This is not the typical sort of labor altercation between a federal employee and his federal employer. Nor is this an action alleging by way of a grievance, adverse action or unfair labor practice, that a federal agency has violated either a provision of a collective bargaining agreement or one of its own regulations, or that the agency has infringed on the collective bargaining rights of a union. Rather, this is a traditional rule-making challenge brought under the APA by a party aggrieved by agency action, 5 U.S.C. § 702, alleging that OPM's rules are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with

law" under 5 U.S.C. § 706(2)(A). (Emphasis added.)"

White v. Office of Personnel Management, 787 F.2d 660, C.A.D.C.,(1986).

"The Supreme Court has spoken clearly on the circumstances necessary to find a constitutionally protected property interest. See, e.g., Cleveland Board of Education v. Loudermill, 470 U.S. 532, 105 S.Ct. 1487, 1491-93, 84 L.Ed.2d 494 (1985); Board of Regents v. Roth, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed.2d 548 (1972) ("To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must instead, have a legitimate claim of entitlement to it.... Property interests ... are created and their dimensions are defined by existing rules or understandings that stem from a[ ] ... source such as state law--rules or understandings that support claims of entitlement to those benefits."). No protected property interest can be shown to exist here. We decline to find the government constrained to afford White a hearing before it may change its employment application procedures. While we can sympathize with White's frustration at having his position on the selection register abolished, we do not think the government is constrained to fulfill White's hope of selection. Despite the lack of merit in White's constitutional claims, the district court was wrong to dismiss them for lack of jurisdiction."

Young v. U.S. , 498 F.2d 1211, C.A.Tex. (1974).

"[8] Where there is a right, so must there be a remedy as well. The plaintiff may vindicate his right to procedural due process by bringing an action under the provisions of the Administrative Procedure Act relating to judicial review, 5 U.S.C. §§ 701-706."

Franks v. Nimmo, 796 F.2d 1230, C.A.10 (Colo.),(1986)

"A probationary VA physician who is separated from service under section 4106(b) may obtain judicial review of the administrative decision. See, e.g., Giordano v. Roudebush, 617 F.2d 511 (8th Cir.1980); see also Heaney,

756 F.2d at 1219 (physician discharged under 38 U.S.C. 4110 entitled to judicial review). Such an administrative decision is a final agency action which may be appealed to a federal court *1240 pursuant to the Administrative Procedure Act. Under the Act, the administrative decision may be set aside if it is arbitrary or capricious, 5 U.S.C. § 706(2)(A) (1982), or unconstitutional, id. § 706(2)(B); Stretton v. Wadsworth Veterans Hospital, 537 F.2d 361, 369 n. 19 (9th Cir.1976). A physician who has been wrongfully discharged may obtain judicial relief in the form of reinstatement and back pay. See Giordano, 617 F.2d at 514-15."

A decision by the 9th Circuit court of appeals where it found jurisdiction over a employee case because it was not covered by the CSRS, similar Mr. Porter's case, because the issues he brought before the court were not governed by the CSRS, Moore v. Glickman, 113 F.3d 988, C.A.9 (Cal.),(1997).

"The district court correctly held that the APA provides Moore with judicial review of her termination. Final agency actions, like this one, are subject to judicial review: "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of the relevant statute, is entitled to judicial review thereof." 5 U.S.C. S 702."

"It is well established that APA review is available to other federal employees who are not governed by the CSRA. 7 See Guerrero v. Stone, 970 F.2d 626, 628 (9th Cir. 1992) (APA review of decisions boards of correction of military records); Berry v. Hollander, 925 F.2d 311, 315 (9th Cir. 1991) (APA review available to discharged VA physician); Garrett v. Lehman, 751 F.2d 997, 999 n.1 (9th Cir. 1985) (APA review of discharge of marine corporal)."

This case also seek answers to several other extremely important questions regarding the Separation of Powers Doctrine including: (1) the jurisdiction of U.S. Courts concerning citizens constitutional rights and its constitutional capacity over federal statues, regulations and rules, which were given solely to the Judicial branch in the U.S. Constitution

Article III, Section 2; (2) the Legislative Branch's authority to violate the U.S. Constitution by granting the Judicial Branch's authority to the Executive Branch to take and use at its own discretion. Thereby granting the Executive Branch the authority to be the sole judge of its one actions in this specific situation and possibility others in the future.

There is no objection to the Executive Branch having quasi judicial administrative processes to perform the Executive Branch functions, such as the MSPB in order to correct its own problems before becoming judicially reviewable. But judicial review must be made available to insure that the Executive Branch is complying with the U.S. Constitution, federal laws, regulations and rules.

The lower courts failed to see or acknowledge the authorities of the U.S. Supreme Court regarding constitutional protections and jurisdiction under the U.S. Constitution Article III, Section 2, (Codified Title 28 section §1331).

Statement of Facts

Mr. Porter was a carrier federal employee for approximately 19 years working for the Department of the Navy at the Naval Air Warfare Center Weapons Division. A classification of employee intended by Congress to have specific job protections when they wrote the CSRA. He lost his job under a RIF action in 1999. Mr. Porter exhausted all available administrative remedies, which were very limited, because his job was covered by a DEMO Project, which had wavers to his normal MSPB, protections, before he filed in U.S. District Court. With his access to the MSPB cut off, the U.S. District Court was his only avenue left to seek equitable relief. The RIF review process he did exhaust, could not even be argued to have come close to the meeting minimum due process requirements and standards set forth by the 5th Amendment and the authorities on that issue by the U.S. Supreme Court for a citizens with property interests, before they are permanently denied their property through an action of our government. Mr. Porter also did not have the MSPB appeal rights available to similarly situated government employee not under a personnel demonstration projects, because of the wavers received to conduct the DEMO Project.

When the lower courts made their respective decisions, See (Appendix AA, BB, CC & DD). they all failed recognize that Mr. Porter's situation was distinguished from all other previous decisions regarding the CSRA. Congress' intent to provide him protections, his right to due process and the authorities of the U.S. Supreme Court, (Star Decisis).

The follow are some examples of authorities not followed.

Constitution right to due process for loss of property by a U.S. Government action: Arnett v. Kennedy, 416 U.S. 134, (1974), Boddie v. Connecticut, 401 U.S. 371, (1971), Board of Regents v. Roth, 408 U.S. 564, (1972), Dent v. West Virgina, 129 U.S. 114, (1988), Department of Navy v. Eglan, 484 U.S. 518, (1988), Gilbert v. Homer, 520 U.S. 924, (1997), Goldberg v. Kelly, 397 U.S. 254, (1970), Honda Motor Co., Ltd v. Oberg, 512 U.S. 415, (1994), LaChance V. Erickson, 522 U.S. 262, (1998), Lindahl v. Office of Personnel Management, 470 U.S. 768, (1985), Logan v. Zimmerman Brush Co., 455 U.S. 422, (1982), Mathews v. Eldredge, 424 U.S. 319, (1976), Morgan v. United States, 403U.S. 1, (1938), Perry v. Sindermann, 408 U.S. 593, (1972), Willner v. Committee on Character and Fitness, Appellate Division of the Supreme Court of New York, First Judicial Department, 373 U.S. 96, (1963), Wolff v. McDonnell, 418 U.S. 539, (1974) and Zinermon v. Burch, 494 U.S. 113, (1990).

Constitutional right to equal protection, that protection receive by other government employees: Baker v. Carr, 369 U.S. 186, (1962), Davis v. Passman, 442 U.S. 228, (1979) and Vance v. Bradley, 440 U.S. 93, (1979).

Jurisdiction of the court to hear constitutional issues, violations of statutes, regulations and rules: Abbott Laboratories v. Gardner, 387 U.S. 136, (1967), Baker v. Carr, 369 U.S. 186, (1962), Bell v. Hood, 327 U.S. 687 (1946), Bishop v. Wood, 426 U.S. 341, (1976), Bowen v. Mich. Academy of Family Physicians, 476 U.S. 667 (1986), Biven v. Six Unknown Named Agents, 403 U.S. 388, (1971), Bush v. Lucas, 462 U.S. 367, (1983), Califano v. Sanders, 430 U.S.

99, (1977), Christian v. New York State Dept. of Labor, 414 U.S. 614, (1974), City of Chicago v. International College of Surgeons, 522 U.S. 156, (1997), Cleveland Board of Education v. Loudermill, 470 U.S. 532, (1985), County of Los Angeles v. Davis, 440 U.S. 625, (1979), Dunlop v. Bachowski, 421 U.S. 560, (1975), Greene V. McElroy, 360 U.S. 474 (1959), Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund Inc., 527 U.S. 308, (1999), Hampton v. Mow Sun Wong, 426 U.S. 88, (1976), International Union, United Automobile, Areospace, and Argicultural Implement Workers of America v. Brock, 477 U.S. 274, (1986), Lindahl v. Office of Personnel Management, 470 U.S. 768, (1985), Rusk v. Cort, 369 U.S. 367, (1962), Sampson v. Murray, 415 U.S. 61, (1974), Shalala, Secretary of Health and Human Services, et al. v. Illinois Council on Long Term Care, Inc., No 98-1109, (2000), Thunder Basin Coal Co. v. Reich, 510 U.S. 200 (1994) and Webster v. Doe, 486 U.S. 592, (1988).

Property interest in job creating due process requirement, Arnett v. Kennedy, 416 U.S. 134, (1974), Bishop v. Wood, 426 U.S. 341, (1976), Board of Regents v. Roth, 408 U.S. 564, (1972), Cleveland board of Education V. Loudermill, 407 U.S. 532, (1985), Gilbert v. Homer, 520 U.S. 924, (1997), LaChance v. Erickson, 522 U.S. 262 (1998), Logan v. Zimmerman Brush Co., 455 U.S. 422, (1982) and Vitk v. Jones 455 U.S. 480, (1980)

Preclusion of Judicial Review.

The court has found that for judicial review to be denied for a government agency action, there must be express statutory language and the court has generally reserved that exception for cases in which the existence of an alternative review procedure provided clear and convincing evidence of a legislative intent to preclude judicial review. Mr. Porter did not have a viable alternative review procedure, suggesting judicial oversight of the plan would be in the federal courts jurisdiction. Further, the Project plan was silent on the issue of Judicial review of a RIF action, therefore the court should assume jurisdiction from that silence.

The lower courts nor the defendant provided any evidence to

support a conclusion that there was an intent any to deny judicial review of any actions taken under this DEMO Project or for any other personnel demonstration projects authorized under the CSRA. The project plan its self is silent on the issue of judicial review and there is no evidence even to suggest such a intent to deny judicial review in the project plan. The Demo Project plan does however state in the Federal Register / Vol. 45, No. 77 / Friday, April 18, 1980 / Notices, page 26510, (Appendix J), "None of the elements of the plan were designed to minimize the rights of individuals or in any way diminish the concern management has for the general welfare of the workforce." Congress, specifically intended competitive employees such as Mr. Porter to receive due process and judicial review of personnel actions. He should not be denied those intended protections because his position was covered under the Demo Project, that removed his normal MSPB appeal rights for employees effected by a RIF. The courts should not have determined it was appropriate to take away his due process rights and deny him access to judicial oversight, when his issues address federal laws, regulations and rules.

Change of Congressional Intent

When the U.S. Supreme Court issued its decision on United States v. Fausto, 484 U.S. 439, (1988), the dissenting opinion by Justice Stevens could not find support for that conclusion that the congress intended to deny judicial review under general jurisdiction and the Administrative Procedures Act.

> "In essence, the majority relies on the bare fact that Congress provided for review of some adverse personnel actions through the MSPB to infer a congressional desire to preclude judicial review of other actions. But congressional silence surely does not provide the clear and convincing evidence of intent we have previously demanded before finding that an existing statutory remedy has been repealed. I respectfully dissent."

This decision that has been used as the basis for the majority if not all decisions by the courts to deny judicial oversight for

actions taken against federal employees. After the U.S. Supreme Court issued it decision on Fausto, Congress re-addressed their intent to preclude or prevent judicial oversight in P.L. 101-12 (5 U.S.C. Sec. §1222). "Availability of other remedies, "Except as provided in section §1221(i), nothing in this chapter or chapter 23 shall be construed to limit any right or remedy available under a provision of statute which is outside of both this chapter and chapter 23."

The congressional finding and purpose in P.L. 101-12 further supports the conclusion that it no longer has any intent to preclude judicial oversight under any other provision of statute.

P.L. 101-12, SEC. 2. FINDINGS AND PURPOSE.

(b) PURPOSE- The purpose of this Act is to strengthen and improve protection for the rights of Federal employees, to prevent reprisals, and to help eliminate wrongdoing within the Government by--

(1) mandating that employees should not suffer adverse consequences as a result of prohibited personnel practices; and

(2) establishing--

(C) that while disciplining those who commit prohibited personnel practices may be used as a means by which to help accomplish that goal, the protection of individuals who are the subject of prohibited personnel practices remains the paramount consideration.

Given this law was written after the Fausto decision and shows congressional intent to provide employees with all the protections under statutes and not limit them. It is believed that the U.S. Supreme Court should revisit it decision on Fausto, to preclude other statutory remedies. This Conclusion is further supported by Davis v. Passman, 442 U.S. 228, (1979), where the court found there must be some avenue of relief.

Separation of Powers

Mr. Porter was denied the protection and availability of the Judicial Branch of his government in violation of our constitution, when the lower courts to dismissed his case of lack of jurisdiction over a government agency action involving constitutional issues and federal statutes. Mr. Porter made many challenges to the actions taken against him by the Navy, including constitutional questions, constitutional challenges, and the Navy's intentional failure to follow statutes, regulations and rules.

The lower court decisions deny Mr. Porter access to all three branches of government. Instead, they grant the sole, authority of the Judicial Branch as identified in the U.S. Constitution, Article III, Section 2: "The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, ... to controversies to which the United States shall be a party.", to the Navy (Executive Branch). Giving the Judicial Branch's authority over to the Executive Branch. Allowing the Navy to be the sole judge of it own actions, even if those actions involving the interpretation and application of the U.S. Constitution, federal statutes, regulations and rules. The Navy can now do anything it wants to do to its employees under the umbrella of this DEMO Project when conducting a RIF Action, because their is no judicial oversight or possible enforcement of constitutional rights, statutes, regulations or rules. The Navy can proceed in any way it see fit, as they did in this case, by granting that authority to two Navy employees, under its direct supervision. Employees whom, it is doubtful that anyone could come to the conclusion, that they were unbiased and did not have an interest in the outcome of their decisions.

The Navy is well aware it has the sole judicial power over its own actions regarding RIF's conducted under this DEMO Project. This is supported in their own documents, in a Navy report on the RIF dated 17 April 2000, page 15 it states; "if any employee tired to challenge the validity of the RIF, they would not be smart enough to bring up the right issues to cause us liability in court" and in another Navy letter, 5800 Air -7.7.4 dated Aug 1999; "With respect to a possible employee challenge of the planned RIF, it is noted that the Naval Air Warfare

Center Weapons Division instruction, NAWCWPNSINST 12351.1, provides that "demonstration project employees had no Merit System Protection Board (MSPB) appeal rights." ... "As such, any subsequent MSPB appeal raising the above referenced issues can be successfully challenged by the agency arguing MSPB lack of jurisdiction." The U.S. Supreme Court just recently addressed separation of powers in Clinton v. City of New York, 524 U.S. 417, (1998), stating:

> Quoting Montesquieu, the Federalist Papers made the point in the following manner:
> "When the legislative and executive powers are united in the same person or body," says he, "there can be no liberty, because apprehensions may arise lest the same monarch or senate should enact tyrannical laws to execute them in a tyrannical manner." Again:
> "Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the judge would then be the legislator. Were it joined to the executive power, the judge might behave with all the violence of an oppressor."

It does not appeal there should be any question that to grant the Navy the authority to be the judge of its own actions is a violation of the Separation of Powers. The Agency must follow their Own rules, see Service v. Dulles, 354 U.S. 363, (1957).

Vagueness

P.L. 103-337, Section 342, (Appendix E) should be declared unconstitutionally vague. It proscribes to make a Personnel Demonstration Project permanent, without defining what the permanent personnel demonstration project is, under a statute that was solely designed to allow for such projects to exist for temporary experimental purposes only, to be conducted and completed within specific time frames. The statute only grants the authority for temporary wavers, not permanent ones. If P.L. 103-337 makes the DEMO Project permanent, does it still have the temporary wavers? The personnel demonstration projects were not intended in the

CSRA to provide a multitude of different personnel systems throughout the government. A question that needs to be answered if P.L. 103-337, is to be understood, what is a permanent temporary experimental project?

A permanent personnel demonstration project is not defined in federal law. In fact, in a letter from the U.S. Office of Personnel Management (OPM), (Appendix L) it makes the conclusion that per P.L. 103-337, "OPM was not longer responsible for "supervising the project"". This brings forth two issues relevant to vagueness question; (1) the text of the statute does not address the issue of OPM's supervision; (2) if OPM not longer supervises the project, as per their letter, there is no definition of this "permanent" demonstration project is and is not defined in federal statutes. The statue, P.L. 95-454, Sec. (a),(4), (Appendix M) defines a demonstration project as "a project conducted by the Office of Personnel Management, or under its supervision" According to the OPM it is no longer being conducted by them or under its supervision.

In a letter from OPM (Appendix N) it changes the name of permanent personnel demonstration project to alternative personnel system, which also not defined in federal statutes. Without a definition of what a this "Permanent DEMO Project" is how can this statute not be vague, considering the statute granting the authority for such projects was intended and written for temporary projects only. Their is also the question of what controls are there over the DEMO Project, can the Navy continue to change it, including more wavers, at will with no supervision or oversight?

Unanswered question on Appellate Court's Decision

If this action taken against Mr. Porter was not an "adverse action" or "prohibited personnel action" why did the court dismiss his case for lack of jurisdiction, because of the CSRA? If this actions did not fall under the CSRA. Then there should be no preclusion of judicial review under general jurisdiction and/or the APA.

Examples of Violations

The statute authorizing personnel demonstration projects, P.L. 95-454, Chapter 47, Sec. §4703, (b), (1), (Codified 5

U.S.C. §4703,(b), (1)), (Appendix F), states that such projects shall have an evaluation plan in place before it is conducted. The project plan published in the Federal Register / Vol. 45, No. 77 / Friday, April 18, 1980 / Notices, pages 26507 and 26526 (Appendix G), states clearly that such an evaluation plan was not written as required, before conducting the project, "a comprehensive and methodologically rigorous evaluation model is being developed". This is a clear violation of statute. There is also no evidence that such any such evaluation plan was ever written.

The plan for the personnel demonstration project also violated the statute by removing employee's right to due process and the MSPB appeal of a RIF Action, P.L. 95-454 Sec. §4703,(c),(5), (5 U.S.C. Sec. §4703,(c),(5)), (Appendix K).

It was violation of P.L. 95-454 Sec. §4703,(c),(5), when OPM and the agency removed the due process rights of the employees effected by a RIF actions under the Demo Project, without providing them other means with which to receive those protections. The statutes states that no wavers that are inconsistent with merit system principals shall be given. Denying employees effected by a RIF an unbiased review process is a violation such principals.

The Demo Project plan itself states in the Federal Register / Vol. 45, No. 77 / Friday, April 18, 1980 / Notices. page 26510, "None of the elements of the plan were designed to minimize the rights of individuals or in any way diminish the concern management has for the general welfare of the work force." (Appendix J). The Navy's argument is that there is no MSPB appeal rights, therefore there is no judicial review available. This argument is inconsistent with the statute and the Demo Project Plan, therefore, it only leaves general jurisdiction and the APA available for the intended judicial oversight and equitable relief.

The findings of congress in the CSRA show their intent to provide competitive employees specific job protections and that those protections should not be denied under Personnel Demonstration Projects.

PL 95-454, FINDINGS AND STATEMENT OF

PURPOSE

Sec. 3. It is the policy of the United States that --,

(3) Federal employees should receive appropriate protection through increasing the authority and powers of the Merit Systems Protection Board in processing hearings and appeals affecting Federal employees;

The Message from the President also supports this conclusion.

To the Congress of the United States:

On March 2nd I sent to Congress a Civil Service Reform proposal to enable the Federal government to improve its service to the American people. Today I am submitting another part of my comprehensive proposal to reform the Federal personnel management system through Reorganization Plan No. 2 of 1978. The plan will reorganize the Civil Service Commission and thereby create new institutions to increase the effectiveness of management and strengthen the protection of employee rights.

The Navy and OPM wrote and approved the Demo Project plan they removed the required merit system principals protections, in violated of the CSRA. The review process under the plan, Federal Register / Vol. 45, No. 77 / Friday, April 18, 1980 / Notices, Page 26552, see (Appendix H), for RIF actions does not meet the minimum standards for Due Process. This is further supported by the letter from the agency, (Appendix I), stating that no structured description of the review process exists and that there is no discovery process. The review process used did not allow for reviewing documents or confronting witnesses.

Effect This Type of Decision Represents

The Legislative Branch can give the constitutional authority of the Judicial Branch to the Executive Branch, which then can operate without any concern for the constitution, federal statutes or citizens rights. With this ability to judge its own actions it can interpret federal law, regulations and rules to fit its needs, with not concern for the balance of power or the citizens rights.

Payer

This citizen filling this appeal praying that the United States Supreme Court will look at the case thoroughly enough to see and understand that the without the courts intervention an injustice will occur. Mr. Porter will be left without a equitable remedy against an action of our government which deprived his of his property without due process or equal protection or a process with which to uphold the U.S. Constitution or challenge federal statutes or their application.

Conclusion

The decisions of the lower courts have left Mr. Porter without an avenue to achieve equitable relief for the loss of his property. The Navy is being granted the authority to be the sole judge of its own actions. If this case is not overturned the Navy is being granted the authority to write , interpret and apply the rules govern its employees with no possibility of oversight. The Navy is also being granted the full and complete authority to determine constitutional questions and constitutional challenges in violation of separation of powers.

Our forefathers setup the judicial branch of the government to protect the citizens against government action, not to protect the government against its citizens. "The touchstone of due process is protection of the individual against arbitrary action of government" Dent v. West Virginia, 129 U.S. 114, (1889). To grant one branch of the government total authority over any issue concerning one of it citizens is clearly not within the intent of our forefathers and their framing of our constitution providing for three branches of government to distribute the power and not leave it all with any one branch. Wolff v. McDonnell, 418 U.S. 539, (1974), "Mr. Justice Douglas, dissenting in part, concurring in the result in part. Said "Not only the principle of judicial review, but the whole scheme of American government, reflects an institutionalized mistrust of any such unchecked and unbalanced power over essential liberties. That mistrust does not depend on an assumption of inveterate venality or incompetence on the part of men in power. . . ." If the court rules that there is no judicial review of OPM's and/or Navy's actions taken under the authority to conduct this Demo Project. OPM and/or the agency could

conceivably interpret and implement the plans in any arbitrary or capricious manner they chose. Including taking away any or all of the employees rights, including those prohibited by the statute itself with no oversight what so ever.

If Mr. Porter is left without a remedy, the whole idea and principal of the Merit System Principles for government employees, a clear intent of congress in their writing of the Civil Service Reform Act (CSRA), is none existent.

When a statute commits a decision to agency discretion as a matter of law, absent statutory review powers, the court can base subject matter jurisdiction only on a patent abuse of discretion which indicates an official is acting outside of his or her statutory authority, see Garcia v. Neagle, 660 F.2d 983 (4th Cir.1981), or on a colorable constitutional claim. Califano v. Sanders, 430 U.S. 99, (1977)

Mr. Porter has not tried to usurp or bypass an administrative process, he just wants a avenue to achieve due process, equal protection, an equitable remedy and the ability all citizens show have, access to all three branch's of their government when they are harmed by its actions.

The court is requested to answer the following question before making its decision on this Petition for Writ of Certiorari. Where does Mr. Porter's remedy lie if not with the federal courts to protect his constitutional rights, his right to challenge federal statues and a citizens ability to ensure that the Executive Branch follows the laws, regulation and rules.

Respectfully Submitted



Ronald L. Porter

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
SEP 30 2002
CATHY A. CATTERSON CLERK
U.S. COURT OF APPEALS

RONALD L. PORTER, Plaintiff-Appellant, v. GORDON R. ENGLAND, Secretary of the Navy, Defendant-Appellee.	No. 01-15564 DC# CV-00-05906-REC Eastern California (Fresno) ORDER

Before: FERNANDEZ, THOMAS and WARDLAW, Circuit Judges

The panel has voted to deny appellant's petition for panel rehearing.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. *See* Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are denied.

Appellant's motion to supplement the record is denied

No further filings shall be accepted on this closed appeal.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
MAY 28 2002
CATHY A. CATTERSON CLERK
U.S. COURT OF APPEALS

RONALD L. PORTER, Plaintiff-Appellant, v. GORDON R. ENGLAND,* Secretary of the Navy, Defendant-Appellee.	No. 01-15564 DC# CV-00-05906-REC MEMORANDUM*

Appeal from the United States District Court
for the Eastern District of California
Robert E. Coyle, Chief Judge, Presiding

Submitted May 13, 2002**
Before: FERNANDEZ, THOMAS and WARDLAW, Circuit Judges

Ronald L. Porter appeals pro se the district court's judgment dismissing, for lack of subject matter jurisdiction, his action under the Administrative Procedures act alleging that he was wrongfully terminated in a reduction in force. We have jurisdiction pursuant to 28 U.S.C. § 1291. We review de

novo the district court's determination that it lacked subject matter jurisdiction, *Skagit County Pub. Hosp. No. 2 v. Shalala*, 80 F.3d 379, 384 (9th

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* Gordon R. England is substituted in place of his predecessor, Richard Danzig, as Secretary of the Navy. See Fed R. App. P. 43(c)(2).

** This panel unanimously finds this case suitable for decision without oral argument. See fed. R. App. P. 34(a)(2). Accordingly, we deny Porter's request for oral argument.

Cir. 1996), and we affirm.

The district court properly dismissed Porter's action because Porter's complaint did not allege that the Secretary of the Navy subjected him to an "adverse action" or "prohibited personnel action". *See Veit v. Heckler*, 746 F.2d 508, 511 (9th Cir. 1984) (holding that the Administrative Procedures Act does not confer jurisdiction over personnel actions covered by the Civil Service Reform Act); see also *Vinieratos v. United States*, 939 F.2d 762, 774 (9th Cir. 1991) (holding that the general jurisdictional provisions of 28 U.S.C. § 1331 provide no independent ground for jurisdiction where a more specific statute explicitly denies jurisdiction).

The district court did not abuse its discretion by denying Porter's Fed. R. Civ. P. 60(b) motion. *See Sch. Dist No. 1J, Multnomah County v. ACandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir, 1993).

We have considered Porter's contentions regarding due process and equal protection and the lawfulness of the China Lake demonstration project and conclude that they are unpersuasive.

AFFIRMED.

FILED
2001 FEB 14 A 10:26
CLERK U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIF

RONALD L. PORTER, Plaintiff, vs. RICHARD DANZIG, Secretary of the Navy, Defendant.	CIV-F-00-5906 REC DLB ORDER DENYING PLAINTIFF'S MOTION FOR RECONSIDERATION

On November 26, 2000, plaintiff filed his motion for reconsideration of the court's November 16, 2000 order dismissing the case for lack of subject matter jurisdiction. Upon due consideration of the plaintiff's written argument and the record herein, the court denies plaintiff's motion for the reasons set forth herein.

I. Factual Background

On November 19, 1999, Porter was terminated through a Reduction in Force ("RIF") action. Porter was a federal employee at China Lake navel Weapons Center, a site chosen by the Office of Personnel Management ("OPM") to be a demonstration project location. As part of the demonstration project, the OPM waved certain statutory and regulatory provisions including those related to RIF Actions.

Porter is proceeding in pro per against Richard Danzig, the Secretary oft the Department of the Navy, for the agency's alleged failure to follow the plan approved for the demonstration project when the agency conducted the RIF.

Plaintiff alleges that the following did not meet the approved project plan: (1) the competitive levels used to conduct the RIF; (2) the use of employee performance rating in the retention standing to execute the RIF; (3) the retreat and bump rules used to carry out the RIF; (4) the agency's failure to place plaintiff into a vacant position it was filled prior to the RIF for which he allegedly was qualified and had expressed interest. In addition, Porter challenges the validity of the project. He argues that the demonstration project was made permanent in 1995 without notice to the effected employees or the public, violating 5 U.S.C. § 553. Moreover, he contends that the law which made the project permanent is unconstitutional because it is not codified. Furthermore, He claims the permanent Personnel Demonstration Project" ins not defined in the statute; thus the congressional act making the project permanent is unconstitutional under the vagueness doctrine.

On November 16, 2000, the court granted defendant's motion for lack of subject matter jurisdiction. The court determined that both the Administrative Procedures Act (APA) and the general jurisdiction grant under 28 U.S. C. § 1131 could not provide an independent basis for jurisdiction. Moreover, the court stated that federal employee personnel action including RIFs were governed by the Civil Service Reform Act ("CSRA"). The CSRA provides the following scheme: 1(10 for adverse actions, judicial review after extensive prior administrative proceedings; (2) for prohibited personnel action, review by the Office of Special Counsel ("OSC"), with judicial suturing limited at most to insuring compliance with the statutory requirement that the OSC provide an adequate remedy; and (3) for minor personnel actions, no review by the OSC or the courts. Under the CSRA, a RIF is not an adverse action. Thus, the court concluded that it could not review the Navy's RIF decision even though the RIF regulations did not apply t plaintiff because the Office of Personnel Management had waived those regulations for employees working at China Lake Naval Weapons Center.

II. Motion for Reconsideration

A motion to reconsider may be brought under Rule 59(e). Rule 59)e) provides in pertinent part: "Any motion to alter or amend a judgment shall be filed no latter than 10 days after the entry of judgment." Reconsideration is warranted in highly unusual circumstances such as when the district court (1) is presented with newly discovered evidence, (2) committed clear error or the initial decision was manifestly unjust, or (3) if there is an intervening change in controlling law. School Dist. No. 1j v. AcandS, Inc., 5 F.3d 1`255, 1263 (9th Cir. 19930.

Plaintiff contends that the court did not give adequate weight to consideration to the fact that plaintiff was not afforded the CSRA's elaborate remedial system because of the OPM's statutory and regulatory waivers. Moreover, plaintiff argues that defendant failed to clearly demonstrate a statutory preclusion to judicial review. Finally, plaintiff maintains that the court has jurisdiction under the APA.

While the court is sympathetic to plaintiff's situation, it is unpersuaded by plaintiff's arguments. As discussed in the court's November 16, 2000 order, the supreme Court in Your Home Visiting Nurses Services, Inc. v. Shalala, 525 U.S. 449, 457058 (1999), has stated that the APA does not provide an independent basis for judicial review of a federal agency's action. Moreover, the Ninth Circuit has held that with respect, to an agency's personnel decision, the APA is preempted by the CSRA Viet v. Heckler, 746 F.2d 508, 511 (9th Cir. 1984). Furthermore, according to the Ninth Circuit, the court has no power to review federal personnel decisions and procedures unless such review is expressly authorized by congress in the CSRA or elsewhere. Id. at 511. In addition, the Supreme Court has held that the CSRA precludes claims arising form constitutional violations and other statutes even where the CSRA itself provides not remedies. United States v. Fausto, 484 U.S. 439, 455, reh'g denied, 485 U.S. 972 (1988).

Under the CSRA, Judicial review is limited to adverse and prohibited personnel actions. Given that a RIF is Clearly neither an adverse nor prohibited personnel decision, the court is precluded for reviewing defendant's RIF action. Therefore, the court has not subject matter jurisdiction over the case.

ACCORDINGLY, IT IS SO ORDERED that plaintiff's motion for reconsideration be denied.

Dated: 2-14, 20012

s/ Robert Coyle
Robert E. Coyle
United States District Judge

FILED
2000 NOV 16 P 3:28
CLERK U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIF

RONALD L. PORTER, Plaintiff, vs. RICHARD DANZIG, Secretary of The Navy, Defendant.	CIV-F-00-5906 REC DLB ORDER GRANTING DEFENDANT'S MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

On October 30, 2000, the court heard defendant's motion to dismiss for Lack of Subject Matter Jurisdiction. Upon due consideration of the written and oral arguments of the parties and the record herein, the Court grants the motion oft the reasons set forth herein.

I. Factual Background

Under title VI of the Civil Service Reform Act of 1978, Congress authorized the Office of Personnel Management ("OPM") to conduct demonstration projects that experiment with new and different personnel management concepts to improve federal personnel management. 5 U.S.C. §§ 4701-4706. The OPM may waive any law and regulation with the exception of:

> (1) any provision of Chapter 63 [leave of work] or subpart G [insurance and annuities benefits] of this title; (2) (A) and provision of law referred to in section 2302 (b) (1) of this tile [prohibition of discrimination on the basis of race,

color, religion, sex, national origin, age, handicapping condition, marital status or political affiliation]; (B) any provision of law implementing any provision of law implementing any provision of law referred to in §2302 (b) (10 of this title by (i) providing for equal employment opportunity through affirmative actions; or (ii) providing any right or remedy available to an employee or applicant for employment in the civil service; (3) any provision of chapter 15 [political activities or state and local employees] or subchapter III of chapter 73 [political activities of federal employees] of this title; (4) and rule or regulation prescribed under any provision of law referred to in paragraph (1), (2), or (3) or this subsection; or (5) any provision of chapter 23 [merit system principles] of this title or any rule or regulation prescribed under this title, if such waiver is inconsistent with any merit system or any provisions thereof relation to prohibited personnel practices.

5 U.S.C. § 4703(c).

The OPM approved a demonstration project plan that was implemented at the China Lake Naval Weapons Center in 1980. 45 Fed. Reg. 26, 511 (1980). The OPM waved application of a number of provisions of law and regulations governing the RIFs at China Lake. In particular, the OPM waved a federal stature and regulations that prescribed the retention order of employees who had been subjected to a Reduction in Force ("RIF"), 5 U.S.C. § 3502 and 5 C.F.R. §§ 351.401 and 315.404(a). Id. The OPM also waved 5 C.F.R. §§ 351.901 and 351.903, which provided employees a regulatory right to appeal a RIF decision to the Merit Systems Protection Board ("MSPB"). Id.

The project replaced the employees, regulatory right to appeal to the MSPB with tow reconsideration procedures. Id. at 26,522. The first procedure addressed reconsideration of performance ratings. Id. the second procedure provided for

reconsideration of classification reconsideration, the request for reconsideration is directed to the supervisor of the classifier for a first-level review. Id. If the dispute is not resolved, the reconsideration request is sent t the Center's principal classifier for a second-level review. Id. If the classification request is still not resolved, the request is sent to the principal classifier at a participating Center for final review and decision. Id.

While the 1978 statute authorized demonstration projects to last no more than 5 years, 5 U.S.C. § 4703 (d0 (1) (B), Congress repeatedly extended the sunset date for the project at China Lake until 1994. In 1995, Congress made the demonstration project permanent by deleting the prior continuance bill's sunset provision. National Defense Authorization Act for fiscal year 1995, P.L. 103-337, 108 Stat. 2662, 2721 (1994) (amending 6 of the Civil Service Miscellaneous Amendments Act of 1983 Pub. L. No. 98-224, 98 stat. 49). the congressional Record explicitly states that the project is permanent. "The National Defense Authorization Act for Fiscal year 1995 made permanent the authority of the Secretary of the Navy to continue personnel demonstration projects at the Naval Air Warfare Center Weapons Division, China Lake, California." 141 Cong. Reg. H14378-01, HJ14690 (Dec. 13, 1995).

Plaintiff Ronald Porter, a civilian employee at the China Lake facility, first challenged the demonstration project's legality sometime in 1996 after he was demoted in a RIF. Kohfield v. Department of the Navy, M.S.P.R. 1, 3 (1997). The MSPB held that the project waivers deprived the board of jurisdiction to review the consolidated appeals from the RIF of Porter and Another Employee at China Lake. Id. at 6. In addition, the MSPB rejected Porter's assertion that the China Lake Project was unlawful because the Project had continued beyond the 5-year statutory time limit. Id. The Board noted that Congress had removed the China Lake project from the time limitations imposed in 5 U.S.C. § 4703 (d) (1) (B) through the National Defense Authorization Act for Fiscal Year 1995. Id. The Board notified Porter of his right to appeal the Boards decision to the United States Court of

Appeals for the Federal Circuit. Id. at 8. Porter did not appeal the Board's decision.

On November 19, 1999, Porter was terminated through a RIF action. Porter, a pro per, sued Richard Danzig, the Secretary of the Department of the Navy, for the agency's alleged failure to follow the plan approved for the demonstration project when the agency conducted the RIF. The complaint alleges that the following did not meet the approved project plan: (1) the competitive levels used to conduct the RIF; (2) the use of employee performance ratings in the retention standing to execute the RIF; (3) the retreat and bump rules used to carry out the RIF; (4) the agency's failure to place plaintiff into a vacant position it was filling prior to the RIF for which he allegedly was qualified and had expressed interest.

In addition, Porter challenges the validity of the project. he argues that the demonstration project was made permanent in 1995 without notice to affected employees or the public, violating 5 U.S.C. § 553. Moreover he contends that the law which made the project permanent is unconstitutional because it is not codified. Finally, he claims that "permanent Personnel Demonstration Project" is not defined in the statute; thus, the Congressional act making the project permanent is unconstitutional under the vagueness doctrine.

II Subject Matter Jurisdiction

Plaintiff asserts that the court has subject matter jurisdiction under both the Administrative Procedures Act ("APA") and the general federal jurisdiction statute at 28 U.S.C. § 1331. Defendant contest both grounds for subject matter jurisdiction.

A. Standard

Under Fed. R. Civ. P. 12(b) (1), a defendant may assert the defense of lack of subject matter jurisdiction by motion. "whenever it appears by suggestion of the parties or

otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." Fed R. Civ. P. 12 (h) (3). As the Ninth Circuit explained, "the defense of lack of subject matter jurisdiction cannot be waived, and the court is under a continuing duty to dismiss an action whenever it appears that the court lacks jurisdiction." Billingsley v. C.I.R., 868 F.2d 1081, 1083 (9th Cir. 1989)

For the court to have subject matter jurisdiction of claims against the United States, the plaintiff must show an unequivocal waiver of sovereign immunity. Blue v. Widnall, 162 F.3d 541, 544 (9th Cir. 1998). In determining whether there is subject matter jurisdiction =, the plaintiff's allegations are not presumptively true and the existence of disputed facts will not preclude the court form evaluating the merits of the jurisdictional claim. Thornhill Pub. v. General Telephone & Electronics Corp., 594 F.2d 730, 733 (9th Cir. 1979) (citations omitted). Moreover, the plaintiff has the burden of proof that jurisdiction doe in fact exist . Id.

B. The Administrative Procedure Act

The APA entitles a person wronged by an agency action to judicial review for nonmonetary damages. 5 U.S.C. § 702. However, judicial review must proceed by "a court specified by statute" or "in a court of competent jurisdiction" 5 U.S.C. § 703. This, the APA does not provide an independent basis for subject matter jurisdiction permitting judicial review of a federal agency's action. Your Home Visiting Nurse Services, inc. v. Shalala, 525 U.S. 449, 450 (1999); Califano v. Sanders, 430 U.S. 99, 107, (1977). The Ninth Circuit has held that with respect to an agency's personnel action, the APA is preempted by the CSRA. Vet v. Heckler, 746 F.2d 508, 511 (9th Cir. 1984).

C. The Civil Service Reform Act

The CSRA established the following scheme: (1) for adverse personnel actions, judicial review after extensive prior

administrative proceeding; (2) for prohibited personnel actions, review by the Official of special Counsel ("OSC", with judicial scrutiny limited at most to insuring compliance with the statutory requirements that the OSC provided an adequate remedy; (30 for minor personnel actions, no Review by OSC or the Courts. Viet, 746 F.2d at 510-11. The court has no power to review federal personnel decisions and procedures unless such review is expressly authorized by Congress in the CSRA or elsewhere. Id. "The CSRA is the exclusive remedy for all prohibited personnel actions." Russell v. U.S. Dep't of the Army, 191 F.3d 1016, 1020 (9th Cir. 1999) (Quoting Brock v. United States, 64 F.3d 1421, 1425 (9th Cir. 1995)

Moreover, the CSRA precludes claims arising from constitutional violations and other statutes even where the CSRA itself provides not remedies. See United States v. Fausto, 484 U.S. 439, 455, Reh'g Denied, 485 U.S. 972 (1988) (CSRA preempts judicial review of Tucker Act or Back Pay Act claim) ; Saul v. United States, 928 F.2d 829, 839-41 (9th Cir. 1991) (CSRA precludes common law tort and Bivens claims). As Ninth Circuit explained, "In the area of federal employment, Congress is better equipped that we to strike an appropriate balance between employee' interests in remedying constitutional violations and the interests of the government and the public in maintaining the efficiency, morale and discipline of the federal workforce." Id. at 840.

Under the CSRA, adverse actions appl, to: (1) a removal; (2) a suspension for more that 14 days; (3) a reduction in grade; (4) a reduction in pay; and (5) a furlough of 390 day or less but does not apply to a reduction -in -force action under 5 U.S.C. § 3502.1 5 U.S.C. § 7512. According to the MSPB:

---

[1] Section 3502 authorizes the OPM to prescribe regulations for the release of competing employees in a reduction in force which give due effect to-- (1) tenure of employment; (2) military preference, subject to section 3501 (a0 (30; (3) length of service;

The statutory provision excluding a reduction-in-force action under section 3502 from chapter 75 [adverse actions} does not refer to the regulatory coverage, however, or to whether an employee affected by the action would be entitled to file a RIF appeal with the board. Instead, it seems to indicate that it is the essential nature of the action-- i.e., whether the action is in the nature of a RIF action or in the nature of an adverse action-- that

determines whether the action is excluded from chapter 75 [adverse actions}.

Marcoux v. U.S. Postal Srevice, 63 M.S.P.R. 373, 378 (1994). Moreover, a RIF is not a prohibited personnel practice under 5 U.S.C. § 2302(b).

In the present case, neither parties dispute the fact that Porter was separated from his job as result of a RIF. Notwithstanding the fact that § 3502 was waved by the OPM, the nature of the action at issue is a RIF rather than an adverse action. Because the RIF is not an Adverse or prohibited personnel action, the Court does not have subject matter over Porter's claim arising from a RIF.

ACCORDINGLY, IT IS SO ORDERED that defendants Danzig's motion to Dismiss for lack of Subject Matter Jurisdiction is granted.

Dated: Nov 16, 2000

s/Robert Coyle
Robert E. Coyle
UNITED STATES DISTRICT JUDGE

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and (4) efficiency of performance ratings.

P.L. 103-337, (S.2182)

National Defense Authorization Act for Fiscal Year 1995
(Enrolled as Agreed to or Passed by Both House and Senate)

SEC. 342. EXTENSION AND EXPANSION OF AUTHORITY TO CONDUCT PERSONNEL DEMONSTRATION PROJECTS.

(a) CHINA LAKE DEMONSTRATION PROJECT- (1) Section 6 of the Civil Service Miscellaneous Amendments Act of 1983 (Public Law 98-224; 98 Stat. 49) is amended by striking out `until September 30, 1995,'.

(2) In the event of a reorganization of the organization carrying out the personnel demonstration project referred to in section 6 of such Act, such section shall apply with respect to the successor to that organization.

(b) DEFENSE LABORATORIES PERSONNEL DEMONSTRATION PROJECTS- (1) The Secretary of Defense may, with the approval of the Director of the Office of Personnel Management, carry out personnel demonstration projects at Department of Defense laboratories designated by the Secretary as Department of Defense science and technology reinvention laboratories.

(2)(A) Each personnel demonstration project carried out under the authority of paragraph (1) shall be generally similar in nature to the China Lake demonstration project.

(B) For purposes of subparagraph (A), the China Lake demonstration project is the demonstration project that is authorized by section 6 of the Civil Service Miscellaneous Amendments Act of 1983 to be continued at the Naval Weapons Center, China

Lake, California, and at the Naval Ocean Systems Center, San Diego, California.

(3) If the Secretary carries out a demonstration project at a laboratory pursuant to paragraph (1), section 4703 of title 5, United States Code, shall apply to the demonstration project, except that--

(A) subsection (d) of such section 4703 shall not apply to the demonstration project; and

(B) the authority of the Secretary to carry out the demonstration project is that which is provided in paragraph (1) rather than the authority which is provided in such section 4703.

PL 95-454 (S 2640)

TITLE VI -- RESEARCH, DEMONSTRATION, AND OTHER PROGRAMS

"CHAPTER 47--PERSONNEL RESEARCH PROGRAMS AND DEMONSTRATION PROJECTS

Sec. 4703. Demonstration projects

"(b) Before conducting or entering into any agreement or contract to conduct a demonstration project, the Office shall--,

"(1) develop a plan for such project which identifies--,

"(H) the methodology and criteria for evaluation;

"(I) a specific description of any aspect of the project for which there is a lack of specific authority; and

"(c) No demonstration project under this section may provide for a waiver of--,

"(5) any provision of chapter 23 of this title, or any rule or regulation prescribed under this title, if such waiver is inconsistent with any merit system principle or any provision thereof relating to prohibited personnel practices.

"(d) (1) Each demonstration project shall--,

"(B) terminate before the end of the 5-year period beginning on the date on which the project takes effect, except that the project may continue beyond the date to the extent necessary to validate the results of the project.

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Evaluation Plan

In order to assess project outcomes and evaluate the feasibility of applications to other federal organizations, a comprehensive and methodologically rigorous evaluation model is being developed. figure 2 summarizes the major categories of variable involved and specifies a set of relationships that will be monitored and evaluated. The evaluation effort will include (1) per-implementation criteria-setting and baseline data collection, (2) multidimensional performance measurements and trend evaluations at specified stated of the demonstration, and (3) a summative - phase comprehensive assessment of the project's overall impact on a set of outcome measures.

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Evaluation Criteria

Evaluation criteria will be deduced from the goals and objectives stated for this experiment. As discussed earlier, multiple criteria will be developed.

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Requests for reconsideration of RIF actions will be initially be reviewed by the Personnel Department official designated as the final authority of RIF processes. If, after this review, the dispute is not resolved, it will be forwarded to the equivalent personnel specialist at the other participating Center for finial review and decision.

(SEAL)

DEPARTMENT OF THE NAVY
NAVAL AIR WARFARE CENTER WEAPONS DIVISION
1 ADMINISTRATION CIRCLE
CHINA LAKE, CA 93555-6100

521 9T STREET
POINT MUGU, CA
93042-5001

IN REPLY TO:
1200
Ser 731000D/480
January 25, 2000

Mr. Ronald L. Porter
200 W. Moyer Street, Space B-20
Ridgecrest, CA 93555

Dear Mr. Porter:

This is in response to your January 18, 2000, request that reconsideration of your November 19, 1999, Separation by reduction in force (RIF) be forwarded to the Space and Naval Warfare Systems Command (SPAWARSYSCOM) for final review and determinations.

Your letter also asks that you be provided "a copy of the RIF reconsideration process, if one exists." Beyond what has been published in the extracts from the Federal Register (which, it is apparent, you already have in your possession), no structured description of the process exists.

Your letter also asks that you "...be given a discovery process..." Discovery is characteristic of processes which are adversarial in nature. Neither a RIF, nor the reconsideration thereof , is adversarial. The published references tot he reconsideration process do not contemplate a discovery procedure.

Your letter asks that you "... be given the opportunity to

submit further information on the reconsideration after I am given the opportunity of discovery process [sic]." Discovery is not appropriate and you will not be extended an opportunity to make additional submissions to the Naval Air Warfare Center Weapons Division in furtherance of your request for reconsideration.

Your letter also asks that you be provided the Name, Address, and phone number of the SPAWARSYSCOM official to whom your request for reconsideration will be summated. That individual is:

Ms. Cheryl Givens-Hayes
Program Manager
Employment and Command EEO Programs
Space and Naval Warfare Systems Command
Code 00A-HR
4301 Pacific Highway
San Diego, CA 92110-3127

(858) 537-0218

By copy of this letter, Ms. Hayes is provided: your December 7, 1999, request for reconsideration; My December 9, 1999, acknowledgment letter; My January 3, 2000 letter of determination and the 34 enclosures thereto: and your January 18, 2000, letter and the 10 Enclosures thereto.

Sincerely,
"s/ Gregory V. Morrow Jr."
GREGORY V. MORROW JR.
RIF Reconsideration Official
Human Resources Department
By direction of the Commander

Copy to:
SPAW;ARSYSCOM (00A-HR) (w/4 encls)

None of the elements of the plan were designed to minimize the rights of individuals or in any way diminish the concern management has for the general welfare of the work force.

PL 95-454 (S 2640)

TITLE VI -- RESEARCH, DEMONSTRATION, AND OTHER PROGRAMS

"CHAPTER 47--PERSONNEL RESEARCH PROGRAMS AND DEMONSTRATION PROJECTS

Sec. 4703. Demonstration projects

"(c) No demonstration project under this section may provide for a waiver of--,

"(5) any provision of chapter 23 of this title, or any rule or regulation prescribed under this title, if such waiver is inconsistent with any merit system principle or any provision thereof relating to prohibited personnel practices.

MESSAGE OF THE PRESIDENT

To the Congress of the United States:

On March 2nd I sent to Congress a Civil Service Reform proposal to enable the Federal government to improve its service to the American people. Today I am submitting another part of my comprehensive proposal to reform the Federal personnel management system through Reorganization Plan No. 2 of 1978. The plan will reorganize the Civil Service Commission and thereby create new institutions toincrease the effectiveness of management and strengthen the protection of employee rights.

I am confident that this Plan and the companion civil service reform legislation will both lead to more effective protection of

Federal employees' legitimate rights and a more rewarding workplace. At the same time the American people will benefit froma better managed, more productive and more efficient Federal Government.

Jimmy Carter.

The White House, May 23, 1978.

(SEAL)

United States
Office of Personnel Management
Washington, DC 20415-0001

Aug 2, 2002

Mr. Ronald L. Porter
200 W. Moyer St., Sp. B-20
Ridgecrest, CA 93555

Dear Mr. Porter:

This is in response to your April 29, 2002, letter, in which you request that the U.S. Office of Personnel Management (OPM) investigate and take corrective action concerning the personnel practices under the demonstration project at the Naval Air Warfare Center Weapons Division at China Lake and Point Mugu, California. You base your request on your statement that "OPM" is responsible to supervise the demonstration project," specifically to determine "if the employees were mistreated by the reduction in force (RIF) actions taken in 1996 and 1999."

When Congress made the China Lake demonstration project a permanent system in 1984, OPM retained its oversight evaluation authority , as it does over all title 5 systems. However, Congress agreed that the demonstration was successfully tested, and OPM was not longer responsible for "supervising the project." That responsibility was legislatively assigned to the Secretary of the Department of Defense in October 1994, in section 342 of the national Defense Authorization for FY 95 (P.L. 103-337, 108 Stat 2663.)

In your letter, you reference a report from the National Academy of Public Administration (NAPA)on the RIF activities at the agency. We consulted with NAPA on the

methodology they used for this report and we were briefed on the results. OPM is very serious about substantiated allegations of prohibited personnel practices or evidence of non-adherence to the merit system principles. Therefore, we took an acute interest in the NAPA Report as part of our oversight responsibility. We believe that a sound investigation was performed by NAPA and reported to OPM in good faith. We stand by our assessment that this was an appropriate investigation of the RIF performed by a third party that hand no personal stake in the outcome of the investigation.

We appreciate the opportunity to respond to you on this matter. If you have any further questions, please contact Ms. Melissa Drummond of my staff on (202) 606-2530.

Sincerely,
s/Paul R. Thompson
Paul R. Thompson
Acting chief, program Development Division
Office of Merit Systems Effectiveness

PL 95-454 (S 2640)

TITLE VI -- RESEARCH, DEMONSTRATION, AND OTHER PROGRAMS

"CHAPTER 47--PERSONNEL RESEARCH PROGRAMS AND DEMONSTRATION PROJECTS

Sec. 4701. Definitions

"(a) For the purpose of this chapter--,

"(4) 'demonstration project' means a project conducted by the Office of Personnel Management, or under its supervision, to determine whether a specified change in personnel management policies or procedures would result in improved Federal personnel management; and

(SEAL)

UNITED STATES OFFICE OF PERSONNEL MANAGEMENT
Washington, DC 20415-0001

Nov 14 2002

Mr. Ronald L.Porter
200 West Moyer Street, Sp. B-20
Ridgecrest, California 93555

Dear Mr. Porter:

This is in response to your letter of October 11, 2002 concerning the reduction in force under the alternative personnel system at the Naval Air Warfare Center Weapons Division at China Lake and Point Mugu, California.

As stated in our august 2, 2002, letter to you, the U.S. Office of Personnel Management is no longer responsible for supervision the alternative personnel system, which was formerly a demonstration project. The Unites States Congress declared in October of 1994 that the project had been successfully tested, and under Public law 103-337, the China lake demonstration project became an alternative personnel system. Congress legislatively assigned responsibility to Secretary of Defense.

The contact person at the Department of defense for the alternative personnel system at China Lake is Ms. Nancy Crawford. Her address is Code 732000D. 1 Administration Cir, China Lake California 93555. She can be reached at 760-939-3196 or by e-mail at crawfordne@navair.navy.mil

we appreciate the opportunity to respond to your inquiry.

Sincerely, (s) Dana K. Stnick
Acting Assistant Director
for Merit Systems Effectiveness

Miller v. U.S. Dept. of Agr. Farm Services Agency, 143 F.3d 1413, 11th Cir.(Ala.),1998

United States Court of Appeals,
Eleventh Circuit.
No. 97-6575.

George MILLER, Plaintiff-Appellant,

v.

U.S. DEPARTMENT OF AGRICULTURE FARM SERVICES AGENCY, USDA, Office of Inspector General, et al., Defendants-Appellees.

June 17, 1998.

Appeal from the United States District Court for the Northern District of Alabama. (No. CV 96-H-496-NE), James H. Hancock, Judge.

Before ANDERSON and BIRCH, Circuit Judges, and COHILL(*), Senior District Judge.

BIRCH, Circuit Judge:

In this appeal, we determine, as a matter of first impression, whether a former employee of a county office of the United States Department of Agriculture Stabilization and Conservation Service ("ASCS") can bring a Bivens action against the federal
government officers responsible for his termination.(1) On summary judgment, the district court ruled that alternate administrative remedies precluded plaintiff-appellant from maintaining a Bivens suit. We affirm.

I. BACKGROUND

The Secretary of Agriculture ("the Secretary") oversees three levels of "representative" committees charged with assisting the United States Department of Agriculture ("USDA") in carrying out its farm programs. See 16 U.S.C. § 590h(b). At the apex of this structure, the Deputy Administrator supervises state committees composed of farmers appointed by the Secretary. See 16 U.S.C. § 590h(b); 7 C.F.R. § 7.4. These state committees are "responsible for carrying out the agriculture conservation program, the production adjustment and price support programs, the acreage allotment and marketing quota programs, the wool and mohair incentive payment program, and any other program or function assigned by the Secretary." 7 C.F.R. § 7.20. Under these state committees, elected county committees actually implement the ASCS's programs. See 16 U.S.C. § 590h(b); 7 C.F.R. §§ 7.4, 7.21. Finally, below these county committees are elected local committees that serve as liaisons between farmers and the state and county committees. See 16 U.S.C. § 590h(b); 7 C.F.R. §§ 7.4, 7.9, 7.22. By regulation, employees of the county and local ASCS committees are hired by and serve at the pleasure of these committees. See 7 C.F.R. §§ 7.28, 7.29. As a result, such workers are not "federal employees" for purposes of the Civil Service Reform Act ("CSRA") (codified in various sections of 5 U.S.C.) and so may not avail themselves of its protections. See, e.g., Hedman v. Department of Agriculture, 915 F.2d 1552 (Fed.Cir.1990) (citing 5 U.S.C. § 2105(a)).

In June 1983, plaintiff-appellant, George W. Miller, received an appointment from the Madison County, Alabama ASCS Committee ("the Mobile Committee") to serve as its County Executive Director ("CED"). See 16 U.S.C. § 590h(b)(5)(E); 7 C.F.R. § 7.21(b)(2). Eleven years later, in March 1994, the Alabama State ASCS Committee ("the Alabama Committee") held a hearing to consider removing Miller from his position because of charges that he had violated ASCS policies upon his receipt of information of possible criminal activity. Immediately following the hearing, the Alabama Committee voted to terminate Miller's employment

pursuant to 7 C.F.R. § 7.28. According to Miller, however, the Alabama Committee's decision was motivated not by concern about his alleged improper behavior but rather by a desire to punish him for his Republican party affiliation.

After his removal, Miller requested a hearing before the Deputy Administrator, pursuant to 7 C.F.R. §§ 7.30 and 7.31. As authorized by 7 C.F.R. § 7.32, a designee of the Deputy Administrator held a two-day hearing and issued a report to the Deputy Administrator recommending Miller's termination. Miller maintains that the Deputy Administrator's subsequent adoption of the recommendation constituted a deprivation of due process. Miller further alleges that improper motives inspired the Deputy Administrator's confirmation of Miller's dismissal.

On February 26, 1996, Miller filed suit pro se in the district court against a variety of federal officials and agencies, alleging violations of his First Amendment right of free speech and his Fifth Amendment right of due process. Although Miller initially sought relief under 42 U.S.C. §§ 1983 and 1985(3), the district court subsequently construed the complaint as asserting claims under Bivens, since all of the defendants were federal agencies or officials. On April 1997, the defendants-appellees ("Appellees") moved to dismiss, inter alia, on the ground that the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706, provides an exclusive remedy for improper terminations of ASCS county workers. On May 28, 1997, the district court agreed that Miller's right to judicial review under the APA precluded him from bringing a Bivens action, and the court therefore
dismissed his suit.

II. DISCUSSION

On appeal, Miller renews his contention that he is entitled to bring an action against Appellees for money damages. In assessing a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), a court must accept all of the facts in the complaint as true, granting the motion only if it appears

beyond doubt that the plaintiff can prove no set of facts that would entitle him to relief. See St. Joseph's Hosp. v. Hospital Corp. of Am., 795 F.2d 948, 953 (11th Cir.1986). We review the district court's decision to dismiss Miller's claims de novo. See McKusick v. City of Melbourne, 96 F.3d 478, 482 (11th Cir.1996).

In Bivens, the Supreme Court held that victims of Fourth Amendment violations by federal officers could bring suit for money damages in federal court even though no federal statute expressly authorized such relief. See Bivens, 403 U.S. at 397, 91 S.Ct. at 2005. Although the Court subsequently allowed Bivens actions for violations of other constitutional rights, it has more recently "responded cautiously to suggestions that Bivens remedies be extended into new contexts." Schweiker v. Chilicky, 487 U.S. 412, 421, 108 S.Ct. 2460, 2467, 101 L.Ed.2d 370 (1988). In particular, the Court has emphasized that Congress is in a better position than the courts to weigh the competing policy imperatives involved in the creation of remedies for aggrieved employees. See Bush v. Lucas, 462 U.S. 367, 389, 103 S.Ct. 2404, 2417, 76 L.Ed.2d 648 (1983). Because of its better vantage point, Congress may preclude a Bivens-type constitutional action by express declaration or by creating an exclusive statutory remedy. See Chilicky, 487 U.S. at 421, 108 S.Ct. at 2467; Lucas, 462 U.S. at 377-78, 103 S.Ct. at 2411. Additionally, "special factors" may foreclose the bringing of a Bivens action even "in the absence of affirmative action by Congress." Chilicky, 487 U.S. at 421, 108 S.Ct. at 2466 (internal quotation marks omitted); Lucas, 462 U.S. at 377, 103 S.Ct. at 2411; Bivens, 403 U.S. at 396-97, 91 S.Ct. at 2005. As the Court explained in Chilicky:

[T]he concept of "special factors counselling hesitation in the absence of affirmative action by Congress" has proved to include an appropriate judicial deference to indications that congressional inaction has not been inadvertent. When the design of a Government program suggests that Congress has

provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration, we have not created additional Bivens remedies.

487 U.S. at 423, 108 S.Ct. at 2468. Thus, before allowing Miller to bring a Bivens action, we must determine whether Congress has expressly precluded such a suit (through specific language to that effect or through establishment of an exclusive remedy), and whether any "special factors" counsel hesitation in extending Bivens to allow aggrieved ASCS county workers to bring suits against their superiors for money damages.

Although Miller has presented us with an issue of first impression for this court, we do not write on an entirely blank slate. Two Circuits, the Eight and the Ninth, have already explored whether ASCS county staffers can bring Bivens actions against federal officers who allegedly violated their constitutional rights. See Krueger v. Lyng, 927 F.2d 1050 (8th Cir.1991); Moore v. Glickman, 113 F.3d 988 (9th Cir.1997). In Krueger, a panel of the Eighth Circuit found an absence of either explicit congressional preclusion or "special factors." See Krueger, 927 F.2d at 1054-57. In the view of the Krueger court, the administrative remedy made available by the Secretary to terminated ASCS county workers is "hollow." See id. at 1056. Moreover, the Krueger court believed that "it is clear that the general enabling language used in 16 U.S.C. § 590h(b) cannot be read to evince an intent by Congress to provide a separate (and less desirable) remedial scheme for ASCS county office employees." Id. at 1055. Therefore, the Krueger court saw no indication that Congress intended "this meager remedy to be Krueger's exclusive remedy." Id. at 1056. Moreover, because ASCS county staffers' "exclusion [from the CSRA] is solely the result of the Secretary's sua sponte decision to use a "nontraditional' hiring method," the Krueger court concluded that such workers' lack of a CSRA remedy reflects an "inadvertent omission" by Congress. Id. Thus, the Krueger court held that ASCS county employees

could bring suit for Bivens damages against federal officials involved in their terminations. See id. at 1057.

In Moore, however, a panel of the Ninth Circuit found Krueger unpersuasive. Unlike the Krueger court, the Moore court believed it had ample evidence not only that Congress is aware of ASCS county staffers' unique status but also that Congress has chosen to give such workers only selective employment rights. See Moore, 113 F.3d at 992. Specifically, the Moore court noted that Congress has granted ASCS workers:

> entitlement to severance pay, 5 U.S.C. § 5595(a)(2)(B); participation in the Civil Service Retirement System, 5 U.S.C. § 8331(1)(F); eligibility for group life insurance, 5 U.S.C. § 8701(a)(8); and eligibility for health insurance benefits, 5 U.S.C. § 8901(1)(G). Former ASCS county employees who have later taken civil service positions governed by the CSRA receive credit for their ASCS service, 5 U.S.C. § 3502(a)(4)(C)(i), and for their rights to annual leave and transfer, 5 U.S.C. § 6312(a)(1).

Id. Further, the Moore court observed that, when Congress has wished to confer CSRA "employee status" on ASCS county staffers, it has done so by express terms, as in its inclusion of such workers in the Civil Service Retirement System. See id. (citing 5 U.S.C. § 8331(1)(F)). Finally, the Moore court explained that, when Congress restructured the Department of Agriculture in 1994, it explicitly recognized the "non-employee" status of ASCS county workers. See id. at 992-93; 7 U.S.C. § 6932(e)(1) ("In the implementation of programs and activities assigned to the Consolidated Farm Service Agency, the Secretary may use interchangeably in local offices of the Agency both Federal employees of the Department and non-Federal employees of county and area committees established under section 8(b)(5) of the Soil Conservation and Domestic Allotment Act...."). In conjunction with this evidence of congressional "advertence" regarding the

status of ASCS county staff, the Moore court also recognized that Congress has already created a statutory remedy for non-CSRA workers through its provision in the APA for judicial review of final agency orders. See Moore, 113 F.3d at 994; 5 U.S.C. § 702.(2) Therefore, the Moore court concluded that ASCS county workers' statutory right under the APA precluded them from bringing Bivens actions. See Moore, 113 F.3d
at 995.

Having carefully studied this split between our sister circuits, we find Moore's reasoning to be more persuasive and more consistent with our precedents. As a federal worker outside the protections of the CSRA, Miller already has a statutory right to judicial review under the APA. See, Young v. United States, 498 F.2d 1211, 1218 (5th Cir.1974);(3) see also Franks v. Nimmo, 796 F.2d 1230, 1239-40 (10th Cir.1986); Heaney v. United States Veterans Admin., 756 F.2d 1215, 1219-22 (5th Cir.1985). Because the Deputy Administrator's rejection of Miller's appeal constitutes a final order, he may bring suit in federal court for relief. See Franks, 796 F.2d at 1239-40; 5 U.S.C. § 702. Although the reinstatement and back pay potentially available to Miller under the APA would not constitute a complete remedy, the Constitution does not require Congress to provide comprehensive relief for violations of federal employees' constitutional rights. See Chilicky, 487 U.S. at 422-23, 108 S.Ct. at 2467.

Under our circuit's precedents, the existence of a right to judicial review under the APA is, alone, sufficient to preclude a federal employee from bringing a Bivens action. See Gleason v. Malcom, 718 F.2d 1044, 1048 (11th Cir.1983) (per curiam); Grier v. Secretary of the Army, 799 F.2d 721, 725 n. 3 (11th Cir.1986).(4) The ample evidence, discussed above, that Congress has not only recognized ASCS county staffers' unique status (i.e., that they are outside the protections of the CSRA) but also has acted to grant such workers only selective

employment rights, only strengthens the necessary conclusion under our circuit's precedents that Miller may not seek a judicially-created damages remedy for violations of his rights during the course of his termination. In sum, we hold that Congress has not been "inadvertent" in providing Miller with only an incomplete remedy under the APA and
that this alternative remedy precludes Miller from bringing a Bivens action for money damages against Appellees in federal court.

III. CONCLUSION

Miller seeks to pursue a Bivens action against federal officers who allegedly have violated his constitutional rights in terminating him from his position as CED for the Mobile Committee. The only remedy that Congress has provided Miller for the wrongs that he claims to have suffered is that specified in § 702 of the APA. Congress, however, has not failed to confer CSRA-protected status on ASCS county workers through oversight or inadvertence; Congress has recognized such staffers' unique position and has specifically granted them employment rights as it has thought appropriate. Therefore, we hold that Miller's right to judicial review under the APA precludes him from bringing a Bivens action concerning his termination from his position as CED for the Mobile Committee, and we AFFIRM the decision of the district court.

ANDERSON, Circuit Judge, concurring specially:

I concur. I agree that our precedents indicate the result reached in this case. See Grier v. Secretary of the Army, 799 F.2d 721 (11th Cir.1986); Dynes v. Army Air Force Exchange Service, 720 F.2d 1495 (11th Cir.1983); Gleason v. Malcom, 718 F.2d 1044 (11th Cir.1983).

FOOTNOTES

*. Honorable Maurice B. Cohill, Senior District Judge for the Western District of Pennsylvania, sitting by designation.

1. Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619
(1971)

2. Curiously, the Krueger court did not discuss the possibility that an aggrieved ASCS county staffer might have a right to judicial review under the APA. See Krueger, 927 F.2d at 1053 (stating that "[t]here is no provision for any sort of judicial review" for ASCS county workers).

3. See Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir.1981) (en banc) (adopting as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981).

4. We regret that neither Miller nor Appellees have chosen to cite these instructive cases from our circuit in their submissions to this court.

Tiltti v. Weise,155 F.3d 596, C.A.2 (N.Y.),(1998).

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 650 -- August Term 1997

(Argued: November 20, 1997 Decided: September 14, 1998)

Docket No. 97-6078

ALLAN TILTTI, ANTHONY COPPOLA, NORMAN MENTZEL, MARTIN WITRIOL, ALEXANDER JASZENKO, MICHAEL SERAK, VONZELL HARRIS, CHRISTOPHER JAMES, WHITLEY AZURE, KENNETH BAGBY, and LEONARD DOBIS,

Plaintiffs-Appellants,

v.

GEORGE WEISE, as Commissioner, DEPARTMENT OF THE TREASURY, ROBERT E. RUBIN, DEPARTMENT OF TREASURY, and UNITED STATES CUSTOMS SERVICE,

Defendants-Appellees.

Before: KEARSE, OAKES and FRIEDMAN*, Circuit Judges.

Appeal from the judgment of the United States District Court for the Southern District of New York, Baer, J., granting the defendants' motion to dismiss, for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted in a suit by present and former federal employees challenging their reassignment to different geographical

locations.

Affirmed.

LLOYD SOMER, New York, N.Y., for the Plaintiffs-Appellants.

PIERRE M. GENTIN, Assistant United States Attorney for the Southern District of New York (MARY JO WHITE, United States Attorney and MARLA ALHADEFF, Assistant United States Attorney for the Southern District of New York, on the brief) for the Defendants-Appellees.

FRIEDMAN, Circuit Judge:

The appellants, 11 present and former Customs Patrol Officers (Patrol Officers) of the United States Customs Service (Customs), challenge the district court's dismissal of their amended complaint seeking to overturn Customs reassigning them to different geographical locations. The district court dismissed the first claim for relief for lack of subject matter jurisdiction, and the second claim for relief for failure to state a claim upon which relief could be granted. The Patrol Officers' appeal challenges only the dismissal of the first claim for relief. We affirm.

I.

A. The underlying facts are not disputed. By letters dated March 21, 1995, Customs' Assistant Commissioner of its Office of Investigation informed all Patrol Officers, then numbering 16, that they were being reassigned to offices along the southwestern border of the United States. Those 16 Officers were then working in New York, New Jersey, Florida, Virginia, and Texas. The letter listed eight reassignment locations (two in California and three each in Arizona and Texas) for which the Patrol Officers were asked to indicate their preference.

The letter stated that if the Patrol Officer "decline[d] this

reassignment," Customs would initiate proceedings to remove the officer and that if the officer faced mandatory retirement (at age 57) or was eligible to retire by March 30, 1996, the officer could do so instead of transferring. The Patrol Officers were to inform Customs of their decision within 15 days of receipt of the letter, and failure so to reply "w[ould] be considered a declination."

The opening paragraph of the letter explained the reassignment:

> Within the last year, the Administration and the Customs Service have recognized a need to strengthen our presence along the Southwest Border. Specifically, there is a critical need to intensify interdiction and other enforcement operations at a number of border locations. In order to establish a stronger enforcement posture along the Southwest Border, we are directing the reassignment of all Customs Patrol Officers, not currently on or near the Southwest Border, to offices along the border where their expertise and training can be more effectively utilized.

A. declaration by the Customs official who was "the principal staff officer responsible for the development and implementation of the 1995 plan to reassign all Customs Patrol Officers ("CPOs") throughout the United States to positions on the Mexican-American/Southwest Border of the United States (the "Southwest Border")" stated:

> In 1985, the drug smuggling threat on the Southwest Border increased. In the mid-late 1980's all CPOs assigned to the Boston, Philadelphia, and Baltimore field offices were reassigned to the Southwest Border in order to counter the threat on that border. No action was taken at that time to reassign CPOs from other locations such as New York, because of the belief that sufficient threat continued to exist to warrant retention of those CPOs within their regions. . . .

> In 1995, as the drug smuggling threat on the Southwest Border continued to increase, and because there was little or no identifiable threat of drug smuggling between the Ports of Entry along the East and West Coasts or along the Canadian border, action was initiated to reassign all CPOs nationwide to the Southwest Border. This decision was made because the greatest need for CPOs is on the Southwest Border.

Of the 11 appellant Patrol Officers who received reassignment notices, 2 accepted reassignment and the other 9 elected to retire.

B. In March 1996, 10 of the Patrol Officers filed the present suit in the United States District Court for the Southern District of New York against the Commissioner of Customs. The complaint alleged that the Commissioner had "acted arbitrarily, capriciously, and illegally" in reassigning the Patrol Officers, and that the reassignment was "an adverse action and/or a reduction in force" and was "intended to force the resignations or the retirement of the [Patrol Officers] from federal service." The complaint stated that it was "a suit for a preliminary and a permanent injunction preventing the defendant from mandating the reassignment of the CPOs to the Southwest Border."

The district court denied a preliminary injunction barring Customs from enforcing the reassignment order. The court held that the plaintiffs had failed to show either a likelihood of success on the merits or irreparable injury.

Two days before the district court's ruling, the Patrol Officers filed with the Office of Special Counsel a complaint against Customs seeking "an immediate investigation into the allegations that the agency has acted improperly . . . based on a directive dated March 21, 1995 in which all the CPOs were ordered to report to the Southwest Border of the United States, or be terminated." The complaint requested that the Special Counsel "move to prevent the forced resignation, forced

retirement, and/or reassignment of the CPOs." Enclosed with the complaint were copies of two affidavits the Patrol Officers had filed in the district court in support of the motion for a preliminary injunction describing their contentions in detail.

Almost eight months later, the Office of Special Counsel informed the Patrol Officers that it had "made a preliminary determination to close the investigation into this matter." The Special Counsel stated:

> It appears that the Service assessed a need in the Southwest for stepped-up interdiction, a service that Custom Patrol Officers could readily provide. While you believe that you had no other choice but to retire, it does not appear that the Service coerced your retirement. In fact, the Service gave you three alternatives to reassignment to the Southwest. We found no facts suggesting that the Service asked you to retire, or that there were any adverse actions pending against you. Further, it does not appear that you were under any time pressure to retire, because it appears that you were allowed fifteen days to make your decision.

Six months after the district court denied a preliminary injunction, the Patrol Officers (their number increased to 11) filed anamended complaint, which contained two claims for relief. The first claim for relief asserted that as a result of Customs'arbitrary, capricious, and illegal actions in ordering the reassignments, nine of the Patrol Officers had been coerced into retiringand the other two into relocating. The amended complaint based jurisdiction over this claim on 28 U.S.C. §1331 (1994) and onthe Administrative Procedure Act, 5 U.S.C. §701 et seq. (1994). The second claim for relief charged that the reassignments violated the Age Discrimination in Employment Act, 29 U.S.C. §621 et seq. (1994). The relief requested included the return toduty of the Patrol Officers "who were forced to retire on March 30, 1996," that any Patrol Officers who transferred to theSouthwest Border as a result of the March 21, 1995 reassignment "be allowed to return to their former job duty positions," thatthe reassignment directive "be

stricken and declared null and void," and that the Patrol Officers be retroactively promoted.

On the government's motion, the district court dismissed the amended complaint. The court held that it lacked jurisdiction underthe Administrative Procedure Act for the reason it had stated in denying a preliminary injunction: "The APA makes plain theintent of Congress which was clearly and unequivocally to preclude direct appeal to the federal courts of agency decisions."

The court ruled that it had no jurisdiction under the Civil Service Reform Act of 1978 (Reform Act), Pub. L. 95-454, 92 Stat.1111 et seq. (codified in various provisions of Title 5 of the United States Code), because under that Act "when a reassignment is made for alleged impermissible reasons, such as with the allegations here, the aggrieved federal employee has a single remedy,i.e. he may petition the Office of Special Counsel ("OSC") and seek an investigation of the claim. Under the CSRA's comprehensive remedial scheme, judicial review is `limited, at most, to insuring compliance with the statutory requirement that the OSC perform an adequate inquiry.'" (citations omitted) The court noted that the Patrol Officers had sought relief from the Office of Special Counsel, which ruled that "the Customs Service had not committed any improper act." The court further noted that "[n]owhere in plaintiffs' complaint or moving papers do they request that this Court review OSC's actions to insure that its inquiry complied with the statutory requirement."

Finally, the court rejected the Patrol Officers' argument that it had jurisdiction because the reassignments were made in retaliation for the officers' exercise of their First Amendment right to discuss various issues relating to their employment. The court stated that the Reform Act "does not preclude judicial review of a federal agency's actions where the plaintiff asserts such actions violated his constitutional rights," but that First Amendment protection requires that the employee be addressing matters of public interest rather than the employee's own private concerns. After reviewing the statements that the

Patrol Officers contended constituted an exercise of their First Amendment rights, the court held that those statements "concerned matters of private interest rather than those of public concern."

The court dismissed the second claim for relief, alleging violations of the Age Discrimination in Employment Act, for failure to comply with the procedural requirements of that Act. Since the Patrol Officers do not challenge that ruling, we do not further
discuss it.

II

A. In United States v. Fausto, 484 U.S. 439 (1988), the Supreme Court explored the relationship between the structure of and the remedies under the Reform Act and the litigation of federal employee issues in other forums. The question was whether a federal employee could maintain a suit in the United States Claims Court for back pay under the Back Pay Act based upon his allegedly improper suspension, when he could not have challenged that action under the administrative procedures of the Reform Act. The Court of Appeals for the Federal Circuit ruled that he could maintain the suit. The Supreme Court reversed, holding that the Reform Act precluded the Claims Court suit.

The Supreme Court stated that "[a] leading purpose of the [Reform Act] was to replace the haphazard arrangements for administrative and judicial review of personnel action" that previously had characterized "the civil service system," "with an integrated scheme of administrative and judicial review, designed to balance the legitimate interests of the various categories of federal employees with the needs of sound and efficient administration." Id. at 444-45. Fausto was a nonpreference employee in the excepted service of the civil service system, and therefore had fewer rights and protection than employees in the competitive service. See id. at 441 n.1. The Court pointed out that "[t]hree main sections of the [Reform Act] govern personnel action taken against members

of the civil service. In each of these sections, Congress deals explicitly with the situation of nonpreference members of the excepted service, granting them limited, and in some cases conditional, rights." Id. at 445. The Court noted that none of those sections gave nonpreference excepted employees the right to seek either administrative review or judicial review of a disciplinary suspension of the type that Fausto was challenging. The Court concluded:

> The [Reform Act] established a comprehensive system for reviewing personnel action taken against federal employees. Its deliberate exclusion of employees in respondent's service category from the provisions establishing administrative and judicial review for personnel action of the sort at issue here prevents respondent from seeking review in the Claims Court under the Back Pay Act. Id. at 455.

The basic principle announced and applied in Fausto is that the Reform Act's "comprehensive system for reviewing personnel action taken against federal employees" provides the exclusive remedy by which those employees may challenge such actions and, unless the Reform Act either explicitly or by necessary implication sanctions judicial challenges to such actions, judicial challenge is foreclosed. See, e.g., Ryon v. O'Neill, 894 F.2d 199, 202-04 (6th Cir. 1990); Carducci v. Regan, 714 F.2d 171, 175 (D.C. Cir. 1983) (holding limited to non-constitutional claims).

The Patrol Officers' complaint in this case challenges their reassignment to a different geographical location, at the same grade and pay they had at their prior location. In the case of "adverse action" against a government employee, the Reform Act "provides formal proceedings before the agency, and appeal to the Merit Systems Protection Board, and judicial review in the Court of Appeals for the Federal Circuit." Carducci, 714 F.2d at 173 (citations omitted). The Merit Systems Protection Board (Board) has no jurisdiction, however, to review a reassignment of an employee to a new

location at the same pay and grade, because such reassignment is not an adverse action. See Manning v. Merit Sys. Protection Bd., 742 F.2d 1424, 1427 (Fed. Cir. 1984); Thomas v. United States, 709 F.2d 48, 50 (Fed. Cir. 1983). The geographical assignment of individual employees is ordinarily within the discretion of the employing agency. See Urbina v. United States, 530 F.2d 1387, 1390 (Ct. Cl. 1976).

The Reform Act does provide a method by which government employees may challenge such reassignment orders: the employee may file a petition with the Office of Special Counsel. 5 U.S.C. §§ 1212(a)(2), 1214(a)(1)(A) (1994). The Special Counsel must investigate "any allegation of a prohibited personnel practice . . . to the extent necessary to determine whether there are reasonable grounds to believe that a prohibited personnel practice has occurred, exists, or is to be taken." 5 U.S.C. §1214(a)(1)(A). A "prohibited personnel practice" is defined to include "a detail, transfer, or reassignment" made for an impermissible purpose as specified in the Act. 5 U.S.C. §2302(a)(2)(A)(iv), (b) (1994 & Supp. II 1997). If the Special Counsel determines that there are reasonable grounds to believe that a prohibited personnel practice has occurred, exists, or is likely to take place, the Special Counsel may request the agency to take corrective action and, if that is not done, may petition the Board for such action. 5 U.S.C. §1214(b)(2)(B), (C).

If the Special Counsel terminates the investigation, the employee who initiated it is told the reason for such action. 5 U.S.C. §1214(a)(2)(A). "Judicial review of an [Office of Special Counsel] decision is limited, at most, to insuring compliance with the statutory requirement that the OSC perform an adequate inquiry on which to base its disposition of an employee's petition." Cutts v. Fowler, 692 F.2d 138, 140 (D.C. Cir. 1982).

The Patrol Officers followed that procedure in the present case, by filing a complaint with the Office of Special Counsel challenging their reassignment as coerced. After investigation, however, the Office of Special Counsel concluded that the

facts did not support that allegation and terminated the investigation. Since the Patrol Officers did not challenge the adequacy of the investigation, no judicial review of the Special Counsel's determination is available.

Other circuits have held that the Reform Act precludes a district court from reviewing under the Administrative Procedure Act an agency's reassignment of an employee. See, e.g., Broadway v. Block, 694 F.2d 979, 986 (5th Cir. 1982); Ryon 894 F.2d at 202-04 (6th Cir. 1990); Weatherford v. Dole, 763 F.2d 392, 393-394 (10th Cir. 1985); Carducci, 714 F.2d at 172 (D.C. Cir. 1983). We agree with those decisions and adopt the same rule for this circuit. Accordingly, the district court correctly dismissed for lack of jurisdiction the Patrol Officers' first claim for relief under the Administrative Procedure Act challenging their reassignment.

B. The Patrol Officers also contend that the reassignments were a disguised reduction in force that was made without following the prescribed procedures for taking such action.

The record, however, does not sustain the Patrol Officers' contention that the reassignments constituted a reduction in force, which occurs when an agency terminates its employees to reduce the size of its work force. See Grier v. Department of Health and Human Servs., 750 F.2d 944, 945 (Fed. Cir. 1984) ("The [reduction in force] regulations . . . provide the administrative process through which the government eliminates jobs and deals with the employees who formerly occupied the abolished positions."). The reassignments were not designed to reduce the number of Customs' employees, but to transfer employees to locations where Customs concluded they were more needed -- as Customs had done ten years earlier in reassigning other Patrol Officers from other locations to the Southwest Border. The Patrol Officers were not subject to a reduction in force. See Krizman v. Merit Sys. Protection Bd., 77 F.3d 434, 439 (Fed. Cir. 1996) ("[T]he reorganization as a whole was not a [reduction in force]; only those employees who were assigned to lower-graded positions as a result of the reorganization were subjected to [reduction in force] actions.").

III

The Patrol Officers argue that in any event the district court had jurisdiction under 28 U.S.C. §1331 over their first claim for relief insofar as it alleged that their reassignment violated their First Amendment rights. According to the Patrol Officers, the reassignments were made in retaliation against their complaints that Customs had mistreated them.

The circuits are divided on whether the Reform Act precludes district court direct review of challenges by federal employees to personnel actions that allegedly violated their constitutional rights. A majority of the circuits that have considered the question have held that the district courts do not have such jurisdiction. See Stephens v. Department of Health and Human Servs., 901 F.2d 1571, 1576 (11th Cir.), cert. denied, 498 U.S. 998 (1990); Saul v. United States, 928 F.2d 829, 835-40 (9th Cir. 1991); Lombardi v. Small Business Admin., 889 F.2d 959, 961-62 (10th Cir. 1989); Pinar v. Dole, 747 F.2d 899, 910-12 (4th Cir. 1984), cert. denied, 471 U.S. 1016 (1985). Contra: see Mitchum v. Hurt, 73 F.3d 30, 35 (3d Cir. 1995); Spagnola v. Mathis, 859 F.2d 223, 229-30 (D.C. Cir. 1988) (en banc) (per curiam) (holding that Bivens remedy was precluded by the Reform Act but noting that "time and again this court has affirmed the right of civil servants to seek equitable relief against their supervisors, and the agency itself, in vindication of their constitutional rights").

This court has not decided the question. We find it unnecessary to do so in this case, however, because we conclude, as the district court did, that the amended complaint does not state a valid claim for violation of the Patrol Officers' constitutional rights. See Paige v. Cisneros, 91 F.3d 40, 44 (7th Cir. 1996) ("We do not think it necessary to choose between these lines of authority [over whether the Reform Act "affect[s] the general grant of federal-question jurisdiction in 28 U.S.C. §1331"] because Paige lacks the sort of substantial constitutional claim that activates the rule requiring doubts to be resolved in favor of judicial review.").

The First Amendment "protects government employees

from termination because of their speech on matters of public concern." Board of County Comm'rs v. Umbehr, 518 U.S. 668, 675 (1996) (emphasis in original) (citing Connick v. Myers, 461 U.S. 138, 146 (1983)); see Bernheim v. Litt, 79 F.3d 318, 327 (2d Cir. 1996) (Jacobs, J., concurring) (public employee may not be demoted in retaliation for speaking on matter of public concern) (citing Rutan v. Republican Party of Illinois, 497 U.S. 62, 75 (1990); Pickering v. Board of Education, 391 U.S. 563, 568 (1968)). Here the record shows, as the district court held, that the Patrol Officers' statements, in retaliation for which they allegedly were reassigned, "concerned matters of private interest rather than those of public concern."

In both their original and amended complaints, the Patrol Officers' First Amendment claim, although not identified as such, was that the reassignments were "an attempt to silence the protests of the CPOs concerning (a) the denial of those job duties established for the CPO position, (b) the failure of the government to promote CPOs to Grade 11 titles, and (c) the rights to proper pay under a Fair Labor Standards Act law suit recently begun on behalf of the CPOs as well as other federal employees." Those allegations all related to the working conditions under which the Patrol Officers functioned - the nature of the work they were assigned and their pay - and are the type of matters that the Supreme Court held in Connick v. Myers to be "only of personal interest" rather than the views of "a citizen upon matters of public concern." 461 U.S. 138, 147 (1983).

The plaintiff in Connick had been a city assistant district attorney. Id. at 140. She was discharged when, after having been informed that she would be transferred to try cases in a different criminal court section, she circulated a questionnaire "soliciting the views of her fellow staff members concerning office transfer policy, office morale, the need for a grievance committee, the level of confidence in supervisors, and whether employees felt pressured to work in political campaigns." Id. at 141. Except for the issue of pressure on employees to work in political campaigns, the Court viewed the questions raised in

the questionnaire "as mere extensions of [the plaintiff's] dispute over her transfer to another section of the criminal court." Id. at 148. The Court declined to find speech to be of public concern that merely reflected an "employee's dissatisfaction with a transfer." Id.

Following the reasoning of Connick, courts have held that expressing dissatisfaction with working conditions is not, by itself, speech on matters of public concern. In Knowlton v. Greenwood Indep. School Dist., the court held that complaints by a group of school cafeteria workers about being required to serve meals at school board meetings without pay, although relating to violations of the Fair Labor Standards Act, addressed "private, not public, concerns." 957 F.2d 1172, 1178 (5th Cir. 1992). This court has distinguished between speech on matters of public concern and "an employee's essentially private complaint" about working conditions. Luck v. Mazzone, 52 F.3d 475, 477 (2d Cir. 1995). In Ezekwo v. New York City Health & Hospitals Corp., we held that a physician's complaints about various aspects of her hospital residency program were not, for First Amendment purposes, matters of public concern. 940 F.2d 775, 781 (2d. Cir.), cert. denied, 502 U.S. 1013 (1991). Although the quality of a physician-training program may affect the public, we concluded that the plaintiff "was not on a mission to protect the public welfare. Rather, her primary aim was to protect her own reputation and individual development as a doctor." Id. The Patrol Officers have not shown they complained about their pre-reassignment job duties, promotion status, or pay level as part of "a mission to protect the public welfare."

The Patrol Officers state in their brief that "the forced relocation of the [Patrol Officers "from the East Coast to the Southwest Border"] would have an adverse impact upon the safety and security of the population at large on the Eastern Seaboard of the United States." Their First Amendment claim, however, is that they were reassigned in retaliation for their prior complaints about their treatment by Customs, and by definition those complaints all antedated the reassignments. Indeed, this claim has a hollow ring in light of the Patrol

Officers' assertion in their brief that "the CPOs had not been performing CPO duties for the past ten years."

The district court correctly ruled that the Patrol Officers failed to state a valid claim under the First Amendment.

CONCLUSION

The judgment of the district court dismissing the amended complaint is affirmed.